Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
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(2)

No. 88-1779

In the Supreme Court of the United States

OCTOBER TERM, 1988

S.E. NICHOLS, INC.

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

24pp

QUESTION PRESENTED

Whether the court of appeals properly concluded that, in light of petitioner's recidivist history and its extensive campaign of unfair labor practices in response to an organizational drive at one of its stores, the National Labor Relations Board did not abuse its discretion to remedy unfair labor practices by ordering certain access and notice remedies in addition to its traditional remedies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 862 F.2d 952. The decision and order of the National Labor Relations Board (Pet. App. 1c-75c), including the decision of the administrative law judge (Pet. App. 1d-285d), are reported at 284 N.L.R.B. No. 55.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1989. The petition for a writ of certiorari was filed on April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, S.E. Nichols, Inc., operates a chain of some 40 discount retail department stores in a number of

states. Five of petitioner's stores in upstate New York (Herkimer, Marcy, New Hartford, Gloversville, and Amsterdam) and three stores in Ohio (Wooster, Ashtabula, and New Philadelphia) are supervised by District Supervisor Henry Korcz. Pet. App. 4a, 6a, 35c & n.13. The Herkimer, Marcy, and New Hartford stores are within 13 miles of each other (*id.* at 44a). Labor policy in all of petitioner's stores is determined and directed by petitioner's president, Manfred Brecker, at corporate headquarters in New York City (*id.* at 44a, 246d). Petitioner has a long history of using unlawful means to resist unionization of its stores (*id.* at 4a, 29c and n.11).[1]

In August 1979,[2] four employees of petitioner's Herkimer store—Dorothy Reinhardt, Doug Vincent,

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[1] See *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), enforced by consent judgment, No. 77-4154 (2d Cir. 1977); *S. E. Nichols Co.*, 156 N.L.R.B. 1201 (1966), enforced in relevant part, 380 F.2d 438 (2d Cir. 1967); *S.E. Nichols-Dover, Inc.*, 159 N.L.R.B. 1071 (1966), enforced, 374 F.2d 115 (3d Cir. 1967); 165 N.L.R.B. 924 (1967); 167 N.L.R.B. 832 (1967), enforced, 414 F.2d 561 (3d Cir. 1969), cert. denied, 397 U.S. 916 (1970); 179 N.L.R.B. 249 (1969), enforced, 73 L.R.R.M. 2816 (3d Cir.), cert. denied, 400 U.S. 831 (1970); *S. E. Nichols of Ohio, Inc.*, 195 N.L.R.B. 939, enforced, 472 F.2d 1228 (6th Cir. 1972); *NLRB* v. *S.E. Nichols of Ohio, Inc.*, 100 L.R.R.M. 2840 (D.C. Ohio 1978), aff'd, 592 F.2d 326 (6th Cir. 1979) (civil contempt); 258 N.L.R.B. 1 (1981), enforced, 704 F.2d 921 (6th Cir.), cert. denied, 464 U.S. 914 (1983); *S. E. Nichols Shillington Corp.*, 195 N.L.R.B. 189 (1972), enforced, 475 F.2d 1395 (3d Cir.), cert. denied, 414 U.S. 860 (1973). Unreported cases include: *NLRB* v. *S.E. Nichols Shillington Corp.*, Civ. No. 75-1751 (3d Cir.) (contempt); *DeProspero* v. *S.E. Nichols Marcy Corp.*, No. 76 CV 5 (N.D.N.Y. 1976) (Section 10(j), 29 U.S.C. 160(j), injunction granted); *Eisenberg* v. *S.E. Nichols, Inc.*, Civ. No. 78-2613 (D.N.J. Jan. 15, 1979) (Section 10(j) injunction granted). Pet. App. 29c n.11.

[2] References are to 1979, until otherwise indicated.

Denise Styles, and Kristin Burkle—began an effort to secure union representation. On August 31, Reinhardt and Vincent contacted the Union,[3] received blank authorization cards, and started to collect signatures. Within two days, the four employees had obtained signed cards from about 27 of the store's 70 employees; in many cases, the cards were signed in or near the store. Pet. App. 5a-6a, 15d-21d.

District supervisor Korcz knew of the organizing activity almost immediately, and came to the Herkimer store two days after the campaign started. The next day he told Reinhardt that she was discharged, handed her an already prepared final paycheck, and said that, if she had any questions, she should call President Brecker or a company vice-president.[4] That evening, Korcz discharged Vincent in the same manner. On September 4, the store manager received a mailgram from the Union claiming majority representation and requesting a card check. Later that day, he summarily discharged Burkle and Styles. Pet. App. 6a-7a, 21d-24d.

Immediately after receipt of the Union's request, Korcz initiated a series of daily meetings with employees in which management aggressively opposed unionization (Pet. App. 33d-34d). In the course of the meetings, Korcz stated that Reinhardt, Vincent, Styles, and Burkle "had been fired for not doing their jobs and not cooperating with management," that they "were passing out [union] cards," that he "didn't want them harassing people in the store

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[3] Retail Store Employees' Union Local 345, United Food and Commercial Workers International Union, AFL-CIO.

[4] Shortly thereafter, an employee asked a supervisor if Reinhardt had been discharged for union activity. The supervisor replied that he "couldn't say," but added that "there would be more to go, it wasn't the end" (Pet. App. 73d-74d).

while they were working," and that the harassment consisted of "[t]rying to get people to sign union cards" (*ibid.*). When asked if they would be reinstated, Korcz answered "[Y]es, but once they're reinstated they don't last too long," thus indicating that pretexts would be found for their later discharge (*id.* at 7a, 99d-100d). Korcz repeatedly advised employees to report "harassment" or "trouble" or if anyone bothered them by trying to get them to sign union cards, and told employees that petitioner's attorney would help the employees with respect to union harassment. Korcz volunteered the information that employees could retract their union authorization cards, and offered to tell them where to send their retractions. He advised employees to let other people know that they had retracted their cards, and said that petitioner's attorney could "receive the union cards." *Id.* at 86d-87d, 97d.

At a September 4 meeting, Korcz announced that new work schedules to which employees had objected would not be put into effect (Pet. App. 75d). At various meetings, he solicited employee suggestions and complaints, and promised to rectify them. Some employee complaints were remedied immediately. The employees were told, however, that if the Union came in, they would have to start all over, and existing benefits could be lost (*id.* at 93d-95d).

On September 7, the Union filed an unfair labor practice charge, alleging that petitioner had violated the National Labor Relations Act (Act) by its discharge of the four union activists, by Korcz's conduct in the employee meetings, and by a rule restricting the acceptance of literature on company property. A complaint issued, and hearings were held in March 1980,[5] in which employees

[5] Further references are to 1980, unless otherwise indicated.

June Klimacek, Fred Pumilio, and Margaret Goldsmith testified under subpoena from the National Labor Relations Board (Board) (Pet. App. 8a, 187d, 205d, 220d). After they testified, all three were subjected to unprecedented scrutiny and harassment by Korcz and their store manager (*id.* at 8a, 187d-231d). Klimacek and Pumilio were given written warnings about their behavior. Goldsmith, an employee with an unblemished record, was denied a promised raise and was advised by President Brecker to "ask the Union to give [her] a raise" (*id.* at 9a, 204d-205d, 213d-216d).

On April 2, President Brecker paid an unusual visit to the Herkimer store and conducted the first of a series of meetings to discourage employees from supporting the Union (Pet. App. 9a, 16c-17c, 155d-183d). At meetings in April, May, and June, with Korcz in attendance, Brecker told employees that "there would be no way in hell that [Reinhardt, Vincent, Styles, and Burkle] would ever come back and work" in his store; that "hell would have to freeze over before [they] would get hired again"; and that he "would not reinstate people that participated in Union activities" (*id.* at 10a, 162d-163d). Brecker added that "some of these cases will go to court for eight to ten years" and that he would "keep appealing them until they get to the highest court" (*id.* at 163d). Referring to events at the store in Marcy, Brecker said that, when petitioner was forced to reinstate employees discharged for union activity, they did not last "because people don't get along with them and I consider them troublemakers and then they leave" (*id.* at 164d).[6] At a meeting in late April, Korcz read

[6] Brecker told employees that the Board was "working for the unions," and that, if the Union won, the Board would not and could not protect the employees. He said that petitioner might lose some cases before the Board, but ultimately it won its "big" cases in the

a letter from the Union stating that petitioner was continuing to use the same scare "tactics" at the Herkimer store that it had used to defeat another union at its store in Marcy. Korcz then said that the Union's statement was correct. *Id.* at 18c, 173d-174d.[7]

The Union filed additional unfair labor practice charges against petitioner, and a second complaint was issued on May 8, alleging, inter alia, unlawful discrimination against Klimacek, Pumilio, and Goldsmith, the employees who had testified before the Board (Pet. App. 4d). At a store-wide meeting on June 5, less than two weeks before the scheduled election on the Union's representation petition, Brecker announced the award of a $2,000 bonus to be distributed among employees and supervisors. The award was not issued pursuant to any written policy statement or established criteria, and no such bonus had ever been granted before at the Herkimer store (*id.* at 183d-184d). Brecker then read aloud from the Board's second complaint and, in an atmosphere of "manipulated hilarity," asked Klimacek, Pumilio, and Goldsmith to respond in the presence of their fellow employees to allegations in the complaint. *Id.* at 22c n.7, 159d-160d.

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courts, a message that was repeated by both Brecker and Korcz in subsequent meetings (Pet. App. 158d, 165d-166d).

[7] The Board had found that petitioner violated the Act at its Marcy store by discharging ten employees who engaged in union activity; coercively interrogating employees; soliciting employees to engage in surveillance of other employees, circulate an anti-union petition, and retract authorization cards; promising rewards and improved benefits and working conditions; threatening to discharge employees and discover the identity of employees who signed authorization cards; issuing written warnings for minor infractions; and imposing economic reprisals. *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), enforced by consent judgment, No. 77-4154 (2d Cir. 1977). Korcz, who was then manager of the Marcy store, was an active participant in the violations. 229 N.L.R.B. at 77-89.

The Union lost the representation election on June 18 by a vote of 47 to 9 (Pet. App. 5d).

2. The Board adopted, with a few exceptions, the findings and conclusions of the administrative law judge (ALJ) as to petitioner's violations of the Act. The Board found that petitioner, acting primarily through Brecker and Korcz, violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening employees with loss of employment, benefits, and other reprisals if they supported the Union; soliciting employee complaints and grievances, remedying some grievances, and promising to remedy others; promising employees wage increases and other benefits to discourage support for the Union and granting an unprecedented bonus to the same end; soliciting employees to withdraw their union authorization cards; stating that it could learn the identity of employees who signed union cards; telling employees that discriminatorily discharged employees would not be reinstated or that, if reinstated, they would not remain employed; maintaining and enforcing overly broad no-solicitation and no-distribution rules; and discriminatorily restricting distribution and solicitation on behalf of the Union. The Board further found that petitioner violated Section 8(a)(1) by telling employees that union activists had been discharged for engaging in protected activities; expressing approval of its conduct at the Marcy store (conduct that had been found to be unlawful) and threatening to engage in similar conduct at Herkimer; soliciting employees to inform petitioner of protected activities; and discouraging cooperation with the Board and use of the Board's processes. Pet. App. 2c-3c, 36c-40c, 232d-234d.

In addition, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging Reinhardt, Vincent, Styles, and Burkle because of their

union activities (Pet. App. 2c-3c, 25d-70d), and Section 8(a)(3), (4) and (1) by withholding a wage increase from Goldsmith, giving Pumilio and Klimacek written warnings, and subjecting all three to more onerous working conditions, increased supervision, and embarrassment and ridicule because they testified in a Board proceeding or supported the Union (Pet. App. 2c-3c, 187d-231d).

As a remedy, the Board issued a broad order, directing petitioner to cease and desist from the violations found and from interfering with its employees' rights to organize "[i]n any other manner." Affirmatively, the Board directed petitioner to remove the overly broad no-solicitation and no-distribution rules from its employee handbook; to offer reinstatement to the discriminatorily discharged employees; to expunge from its records all references to the discriminatory discharges and warnings; and to make all of the discriminatees whole with respect to backpay, wages, and other benefits (Pet. App. 36c-43c).

The Board, with then-Chairman Dotson dissenting, agreed with the ALJ that additional notice and access remedies were required to dissipate the coercive effects of petitioner's unfair labor practices.[8] It noted petitioner's

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[8] The ALJ had noted that "*all* the union instigators were discharged immediately upon the initiation of the organizational campaign," that petitioner had been found guilty of similar misconduct in the past, had been found in contempt of the reinstatement orders as to two employees discharged from its New Philadelphia store for union activity, and had previously engaged in almost "every type of unfair labor practice found" in the Herkimer case (Pet. App. 245d-246d (emphasis in original)). The ALJ rejected petitioner's contention that it should not be subjected to extraordinary remedies because it "has been involved in violations at '*only* a *half-dozen locations* over a *period of fourteen years*' " (*id.* at 248d (emphasis in original)). She observed that "[s]o far as appears, these are the only locations at which union campaigns have initiated. * * * If the past holds any lessons, it might

prior history of unlawful opposition to union activity, affecting five other stores in the 16-year period preceding the effort to organize the Herkimer store, and, in all but one case, involving the participation of President Brecker (Pet. App. 28c-33c, 35c n.13). The Board found that the ALJ was justified in characterizing petitioner "as a 'recidivist' who has at the Herkimer store continued to engage in an 'obdurate flouting of the Act,' " and adopted her conclusion that "extraordinary notice and access remedies are necessary to 'clear the atmosphere poisoned by [petitioner's] unrelenting, egregious and pervasive trampling on its employees' statutory rights' " (*id.* at 33c-34c).

However, the Board disagreed with the ALJ that the extraordinary access and notice remedies should be applied at all of petitioner's stores. Rather, the Board concluded that applying them to the eight stores in the district supervised by Korcz would adequately effectuate the policies of the Act. The Board noted that President Brecker had personally participated in earlier unfair labor practices at "two of [the stores] located in District Supervisor Korcz's district, and Korcz joined him at one of them" (Pet. App. 35c n.13).

Accordingly, the Board ordered petitioner to post for 60 days at the stores in Korcz's district an appropriate notice signed by Brecker, Korcz, and the manager of the particular store, and to mail to employees of those stores a copy of the notice together with an explanatory letter signed by Brecker and the store manager; to give each supervisor at its Herkimer, Marcy, and New Hartford

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teach employees and unions that any attempt by Nichols' employees to exercise their freedom to make a choice contrary to [petitioner's] desires will be both hazardous and doomed to failure, at least without long and tortuous litigation, which, as the present case shows, may itself pose danger for the employees" (*id.* at 248d-249d).

stores a copy of the notice, with instructions, signed by the store manager, to comply with the provisions of the notice; and to convene, during working time, all its employees at each store in Korcz's district and the supervisors at the Herkimer store and have President Brecker read the notice to them. Pet. App. 44c-47c.

In addition to the notice requirements, the Board's order requires petitioner, on request by a union made within two years of the order, to give the union reasonable access to company bulletin boards for a period of one year. During the same two-year period, the order requires petitioner (1) to grant a union equal time if store employees are convened for an address on union representation, and rebuttal time, if requested; (2) if there is a Board election, to allow the participating union to make one 30-minute pre-election speech during working hours; and (3) on request of a union conducting an organizing campaign, to furnish the union with a current and periodically updated list of employees' names, addresses, and classifications. Pet. App. 47c-49c.

3. The court of appeals upheld the Board's unfair labor practice findings and, with one modification, enforced its remedial order.[9]

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[9] The modification concerned the requirement that Brecker read the notice aloud, a requirement that "was designed to 'undo the effect' of numerous and egregious unfair labor practices by assuring employees that the company will respect the rights of workers to form and join unions," and to "insure[] that the full counteracting force of the remedial order will be felt by the employees" (Pet. App. 51a). The court noted, however, that it had previously held, in *NLRB* v. *J. P. Stevens & Co.*, 380 F.2d 292, 304 (2d Cir.), cert. denied, 389 U.S. 1005 (1967), that there is "an element * * * of some humiliation in having Company officials personally and publicly participate." The court, accordingly, limited the reading requirement to the Herkimer store, where the most recent violations had occurred, and required the Board to give petitioner the option of having the notice read by a Board

The court rejected petitioner's challenge to expansion of the order beyond the Herkimer store to the eight stores supervised by Korcz. The court noted that in its own prior decisions upholding the Board's discretion to expand its remedies beyond the actual locations where unfair labor practices were committed,[10] it had considered "whether the employer has repeatedly shown anti-union animus on a broad scale" and whether, as in this case, "a company's labor policies are determined at a central location rather than at each individual workplace" (Pet. App. 41a-42a). The court took judicial notice, as the Board had done, of the many cases finding that petitioner had violated the Act in its opposition to organizing activity, and had done so whenever such activity had occurred.[11] It concluded that "[t]his history almost certainly indicates a general knowledge by the company's employees that it is willing and likely to engage in coercive activity in response to union campaigns in its stores" (*id.* at 43a).[12]

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agent. But it added that it was not holding that the Board's reading requirement " 'would never be appropriate.' * * * We simply hold that it is not called for in the circumstances here." Pet. App. 51a-53a.

[10] *NLRB* v. *Jack La Lanne Management Corp.*, 539 F.2d 292, 295 (2d Cir. 1976); *United Aircraft Corp.* v. *NLRB*, 440 F.2d 85, 100 (2d Cir. 1971); *J. P. Stevens & Co.*, 380 F.2d at 304.

[11] The court observed that in *S. E. Nichols of Ohio, Inc.*, 258 N.L.R.B. 1 (1981), enforced, 704 F.2d 921 (6th Cir.), cert. denied, 464 U.S. 914 (1983) (involving petitioner's New Philadelphia store), the Board had noted petitioner's "clear 'disregard for the rights of its employees and its contempt for' the Act, the Board and the Sixth Circuit", and had stated that petitioner's "history of committing unfair labor practices 'clearly demonstrates' that over a 15-year period the company had 'uniformly committed unlawful acts in response to attempts to organize [its] stores' " (Pet. App. 43a).

[12] The court drew support for that conclusion from the fact that the eight stores affected by the Board's order are all in New York and

The court found substantial record evidence of a "conscious corporate-wide policy to coerce company employees in the exercise of their right to join or form labor unions, at least in the area subject to the jurisdiction of district supervisor Korcz."[13] It held that "on this record, * * * the Board had discretion to select remedies coextensive with that [unlawful] company policy, * * * and to impose district-wide access and notice requirements * * * in order to remedy the chilling effect of the company-produced coercive atmosphere" (Pet. App. 46a-47a).

Turning to petitioner's objections to the access remedies, the court observed "that an extensive campaign of unfair labor practices can produce effects on employees that cannot be offset by * * * conventional remedies," and that "[t]o offset the effects of such unfair labor practices, * * * it has been found necessary in some cases to grant a union access to company bulletin boards or to the plant

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Ohio; that the Herkimer, Marcy, and New Hartford stores are within 13 miles of one another, and that both bargaining unit and management employees had moved between stores in the district (Pet. App. 44a).

[13] The court found it "very important" that the "people responsible for managing the stores at the district-wide level were the individuals most culpable for the findings of violations at Herkimer" (Pet. App. 45a). Thus, the court said, Korcz "participated directly, personally and repeatedly in the unfair labor practices at the Herkimer store" and told the Herkimer employees that, in opposing unionization, petitioner would repeat its conduct at the Marcy store, "even though Korcz knew the conduct was unlawful" (*ibid.*). For his part, Brecker, who had previously participated in unfair labor practices at two stores located in the district, "repeatedly and unrelentingly attacked the Board's neutrality and openly disparaged those employees who had testified on behalf of the Board. He also used coercive tactics such as stating, in effect, that reinstated union adherents do not last very long in the company's employ" (*id.* at 46a).

itself" (Pet. App. 48a).[14] The court held that on this record the Board reasonably found such remedies necessary to effectuate the purposes of the Act. Rejecting petitioner's argument that the Board had made no finding that it had restricted union access, the court said that petitioner did "interfere directly" with union access by "firing the union activists * * * who were in fact acting as conduits of union information." *Id.* at 49a-50a.

The court distinguished this Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), relied on by petitioner for the proposition that its property rights precluded access unless the Union had no other reasonable means of reaching the employees. The court found *Babcock & Wilcox* "inapposite because it does not deal with the remedial powers of the Board; it only seeks to determine when an employer's denial of access to his property can itself be deemed an unfair labor practice" (Pet. App. 50a-51a).

Finally, the court rejected petitioner's contention that the order should not be enforced because of the time lapse between the ALJ's decision and the Board's order, some of which the court attributed to petitioner's "massive attack on the ALJ's decision." Although "troubled by this delay," the court did not believe that it justified a refusal to "insure the company's employees the right to participate freely in union activities" and "to remedy the effect of the company's past unfair labor practices by restoring, as much as possible, the status quo that existed at the time the practices occurred" (Pet. App. 54a-56a).

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[14] Citing *United Steelworkers* v. *NLRB (Florida Steel Corp.)*, 646 F.2d 616, 634-635 (D.C. Cir. 1981); *NLRB* v. *J. P. Stevens & Co.*, 563 F.2d 8, 24-25 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

ARGUMENT

1. Petitioner does not challenge the Board's findings, upheld by the court of appeals, that, in opposing the Union organizational campaign, it engaged in pervasive and egregious violations of the Act, with its president and the supervisor of the stores affected by the order as the most culpable participants.[15] Nor does petitioner argue that the Board lacks the power in appropriate cases to devise extraordinary remedial measures.[16] Indeed, petitioner acknowledges (Pet. 8-10, 14) that notice and posting requirements beyond the store where the unfair labor practices occurred may be appropriate where those prac-

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[15] While petitioner does not directly challenge the Board's unfair labor practice determinations, it asserts (Pet. 7) that the district court's denial of interim injunctive relief under Section 10(j) of the Act, 29 U.S.C. 160(j)—on the ground that there was not reasonable cause to believe that the unfair labor practices charged in the second complaint had occurred (Pet. App. 18a-19a, 4d-5d)—undercuts the propriety of the Board's multi-site remedial order. As the court of appeals properly noted (*id.* at 12a, 17a-20a), findings made on an application for a preliminary injunction under Section 10(j) are not determinative of the merits in a subsequent unfair labor practice proceeding.

[16] Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to enter an order requiring the respondent not only "to cease and desist from such unfair labor practice," but "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]." "Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539 (1943). Accord, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941). Moreover, "[i]n fashioning its remedies * * * the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

tices may cause a chilling effect on labor relations at other locations,[17] and that access requirements may be appropriate where the unfair labor practices create communication problems for the union.[18] Petitioner simply contends (Pet. 6-7) that the notice and access remedies upheld by the court of appeals were unwarranted in this case. That fact-specific claim raises no issue appropriate for review by this Court.

2. In any event, there is no merit to petitioner's contentions.

a. Petitioner contends (Pet. 9) that the Board's district-wide posting and mailing remedy is inappropriate because the violations were limited to the Herkimer store, the stores in the division are geographically remote and unrelated, previous unfair labor practices were unrelated to and not concurrent with the Herkimer violations, and there were no findings that "any of the alleged violations became known outside of the stores in which they purportedly occurred or that they created a 'chilling effect' at other locations." However, the court of appeals found that petitioner's 15-year history of unlawful acts in response to union activity "almost certainly indicates a general knowledge by the company's employees that it is willing and likely to engage in coercive activity in response to union campaigns in its stores" (Pet. App. 43a). The court further found that there was substantial record evidence of a "conscious corporate-wide policy to coerce company employees * * *, at least in the area subject to [Korcz's] jurisdiction," and that in that district there was a need to counter "the chilling effect of the company-

[17] See, *e.g.*, *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969); *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292, 304 (2d Cir. 1967).

[18] See, *e.g.*, *J. P. Stevens & Co.*, 417 F.2d at 540-541.

produced coercive atmosphere" (*id.* at 46a-47a). Moreover, contrary to petitioner's assertion (Pet. 9), the Board, upheld by the court of appeals, found that there was employee interchange between stores in the district (Pet. App. 44a).

In these circumstances, the facts justifying the division-wide posting and mailing remedies ordered in this case fit comfortably within the scope of cases where such remedies have previously been approved,[19] and are distinguishable from cases in which such remedies have been found inappropriate.[20]

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[19] See, *e.g.*, *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 408 F.2d 374, 376 (5th Cir. 1969) (Pet. 8) (assumption that employees at other stores knew of company's interference at one store is "particularly reasonable" in that they shared a common supervisor); *NLRB* v. *Delchamps, Inc.*, 653 F.2d 225, 228-229 (5th Cir.), reh'g denied, 660 F.2d 499 (5th Cir. 1981) (Pet. 8) (although unfair labor practices implicated only local management at three stores, mingling of employees at lunch and dinner meetings justified posting at 17 area stores). Petitioner's contention (Pet. 11) that the Board and the court of appeals inappropriately relied on cases involving J. P. Stevens in ordering multi-site remedial relief only quarrels with the finding that here, as in those cases, there was reason to anticipate that the employer would continue to pursue the same policies and that employees in other facilities would know of, and be chilled by, the unfair labor practices that had occurred. See notes 9, 13, *supra*. Moreover, the Board did recognize a distinction between the *J. P. Stevens* cases and this case by restricting its remedy to eight of petitioner's 43 stores. These eight stores fell within a defined geographical area and under the jurisdiction of a single and particularly culpable supervisor.

[20] In *United Steelworkers* v. *NLRB*, 646 F.2d 616 (D.C. Cir. 1981) (which petitioner cites as *Florida Steel Corp.* v. *NLRB*) (Pet. 9-10), the court of appeals remanded to the Board for further consideration of the necessity for corporate-wide union access as a remedy for "a relatively minor violation" involving a single plant (646 F.2d a at 619, 624). It did so because the Board had made no finding that it was "reasonably foreseeable" that employees at other plants had "suffered

b. Relying on decisions of the Courts of Appeals for the Fifth and District of Columbia Circuits (Pet. 13), petitioner suggests that a requirement that the notice be read aloud is appropriate only to "insure the notice's full dissemination" in the face of illiteracy. Subsequent cases in both circuits make clear that reading requirements fall within the range of the Board's remedial discretion when employers conduct antiunion campaigns in a clearly unlawful manner, and that the illiteracy of the workers receiving the notice is by no means the only justification for such remedial provisions. See *Conair Corp.* v. *NLRB*, 721 F.2d 1355, 1385 (D.C. Cir. 1983), cert. denied, 467 U.S. 1241 (1984); *J. P. Stevens & Co.* v. *NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969). See also, *J. P. Stevens & Co.* v. *NLRB*, 380 F.2d 292, 304-305 (2d Cir. 1967), cert. denied, 389 U.S. 1005 (1968).

c. Similarly, petitioner's contention (Pet. 13-14) that the Board's access remedies are unwarranted here because the unions have easy access to the employees, merely quarrels with the Board's finding, upheld by the court of appeals, that petitioner "did interfere directly with * * * access by firing the union activists at the Herkimer store, who were in fact acting as conduits of union information" (Pet. App. 49a-50a). See *J. P. Stevens & Co.*, 417 F.2d at 540-541 ("But how to communicate when history proves that identifiable activity imperils the job of the actor?").

Petitioner's contention (Pet. 15-16) that the access remedies conflict with this Court's decision in *NLRB* v.

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coercive effects from the employer's unlawful conduct and that an access remedy is necessary to cure those effects," and because the court itself "simply [could] not assume from the evidence in this record that the conduct of Florida Steel has had a corporatewide chilling effect upon employees" (*id.* at 641).

Babcock & Wilcox, 351 U.S. 105, 114 (1956), is without merit. As the court of appeals noted (Pet. App. 50a), in *Babcock & Wilcox* this Court was not concerned with the Board's remedial authority, but with the circumstances in which a denial of access to company property can itself be deemed to be a violation of the Act. In this case, petitioner engaged in pervasive violations of the Act, some of which "did interfere directly" with the union's access to petitioner's employees (*id.* at 48a-50a). The cases cited by petitioner, *e.g.*, *United Steelworkers* v. *NLRB*, 646 F.2d 616, 637-638 (D.C. Cir. 1981) (Pet. 9-10); *J. P. Stevens & Co.* v. *NLRB*, 417 F.2d at 540 (Pet. 8); *Decaturville Sportswear Co.* v. *NLRB*, 406 F.2d 886, 889 (6th Cir. 1969) (Pet. 8, 9), confirm the Board's discretion to remedy such violations by providing access remedies similar to those granted here, without a finding that the Union will be unable to reach the employees through other available means of communication.

d. Finally, there is no merit to petitioner's contention (Pet. 16-19) that the Board's order is inappropriate because of the six and one-half year passage of time between the ALJ's decision and the Board's order. This Court has made clear that the burden of delay, either by the employer or the Board, may not be shifted to innocent employees who are the beneficiaries of the Board's remedial order. *NLRB* v. *J. H. Rutter-Rex Mfg.*, 396 U.S. 258, 265-266 (1969).[21]

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[21] As the court of appeals noted, some of the delay was attributable to petitioner (Pet. App. 54a). Moreover, in light of petitioner's statements to employees that it could delay Board proceedings to their disadvantage, p. 5, *supra*, it is not clear that the delay worked to the disadvantage of petitioner. Petitioner's reliance (Pet. 17) on Second Circuit cases involving bargaining orders is inapposite. As the court of appeals observed (Pet. App. 56a), the remedy here does not require imposing representation on employees who may no longer want it.

Petitioner further asserts (Pet. 18) that the absence of unfair labor practice charges filed against it in over eight years is evidence of its "harmonious labor relations," making the need for a remedial order moot at this time. However, as the ALJ stated, (see note 8, *supra*), petitioner's unlawful conduct appears to have been coextensive with union organizational attempts at its stores. The court of appeals agreed, finding that petitioner has " 'uniformly committed unlawful acts in response to attempts to organize [its] stores' " (Pet. App. 43a). In these circumstances, the court of appeals appropriately found that the passage of time did not diminish the need for the remedial relief ordered by the Board, as modified by the court of appeals (see note 9, *supra*).[22]

[22] The court of appeals' decision is consistent with *NLRB* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970) (Pet. 18). There the Court rejected a claim of mootness but recognized that there might be "situations where an enforcement proceeding will become moot because a party can establish that 'there will be no reasonable expectation that the wrong will be repeated.' " The court of appeals here properly found that, in view of petitioner's past history of opposing union organizational efforts whenever they occurred, there was no reasonable expectation that the wrong would not be repeated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney

MAY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989 - 241 699/00257